

# ‘We Don’t Need No Constitution’ – On a Sad EU Membership Anniversary in Romania

 [verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/](http://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/)

Bianca Selejan Gutan Mi 1 Feb 2017

Mi 1 Feb  
2017

***“No one is above the law”***

***(Constitution of Romania, Article 16 §2 )***

On 25 January 2017, the European Commission has published its progress report on the CVM – Cooperation and Verification Mechanism, a supervisory mechanism imposed to Romania (and Bulgaria) at the time of their European accession in 2007. In the case of Romania, the mechanism was imposed because the country was deemed to be insufficiently prepared as regards the principles of democracy and the rule of law, despite the generous constitutional provisions entrenching those principles. Therefore, the main objectives of the mechanism were the building of a strong judiciary, with guarantees of independence and impartiality AND the anti-corruption fight, as corruption has been seen as one of the major threats to democracy and rule of law in Romania at all times. Since 2007, the CVM reports, issued once or twice a year, have emphasized partial and constant progress, but also a series of threats and backdrops, especially as a result of the political attitude towards the two landmark objectives. The last report comes at a decade after the accession and is intended to make a more detailed analysis over the entire period.

The current [CVM report](#) comes in very troubled constitutional times in Romania. After a rather calm year (December 2015-December 2016), under the technocratic government of Dacian Ciolos, the parliamentary elections of 11 December 2016 have brought the victory of the PSD (Social-Democratic Party), which, together with a smaller social-liberal party (ALDE) [managed to form a majority in Parliament](#). Although the new Government has a rather ambitious general programme, with drops of taxes and raises of salaries and other incomes, some of the first items of the immediate agenda seemed to be the attempt to solve the integrity and criminal problems of party leaders and other politicians. After the installation of the new Government, the Ombudsman (*Avocatul Poporului*), a supposedly independent authority led by a former politician who has been close to the PSD before being appointed in 2014, challenged the constitutionality of a 2001 Law which prohibits persons with criminal convictions to occupy public positions in the Government. This law was the main reason why Liviu Dragnea, the PSD leader, could not be appointed prime-minister: he was convicted by a final judicial decision to 2 years in prison (with suspension of execution) for electoral fraud during the 2012 referendum. An unconstitutionality decision from the Constitutional Court would open Dragnea the path towards prime-ministership in the future. This is one of the most awaited Constitutional Court’s decisions in 2017. However, since the chances of success at the Constitutional Court are rather reduced, the new Government attempted another way to solve the integrity issues of many politicians in a more general way: by promoting new laws on pardon and by changing the Criminal Code so as to surreptitiously decriminalize some corruption offences (by not expressly removing them from the code, but by changing their contents so as to make most of them virtually unpunishable).

Thus, on 18 January 2017, the President of Romania, Klaus Iohannis, exercised his constitutional power to participate and chair the Government meeting, at the invitation of the Prime-Minister, only to warn the Government about two hidden draft Emergency Ordinances on collective pardon and on the change of the Criminal Code respectively. The President warned against the adoption of such measures (which he qualified in a previous speech at the Superior Council of Magistracy as against the rule of law) without a public debate, including by the judiciary and other specialists. On the same day, the draft Ordinances were published on the website of the Ministry of Justice, bearing in their text the date of 18 January, although the Government denied the intention of trying to adopt them at the meeting.

In Romania, Emergency Ordinances are acts of delegated legislation, which can be adopted by the Government

without prior approval of the Parliament, directly by virtue of Article 115 of the Constitution<sup>1)</sup> See also Bianca Selejan-Gutan, *The Constitution of Romania. A Contextual Analysis*, Oxford, Hart Publishing, 2016, pp. 131-133., but only in “exceptional cases, the regulation of which cannot be postponed”. In the explanatory notes, the drafters invoked, on the one hand, the ‘overcrowding’ in Romanian prisons and a supposed ‘fine’ of 80 million euros as a result imposed by an imminent pilot-judgment the European Court of Human Rights (although, obviously, in pilot judgments, the ECtHR imposes no pecuniary damages, but suspends all similar complaints against the state-party concerned, until the latter takes general measures to redress the violations in a delay established by the Court). On the other hand, as regards the changes of the criminal code, the drafters invoked the necessity to apply some Constitutional Court decisions from 2016, which declared unconstitutional some texts of the code, but which did not relate to the actual contested changes.

Following the opening of the public debate, several bodies of specialists advised against the ordinances: the Superior Council of Magistracy (CSM)<sup>2)</sup> Ibidem, pp.193-197., the president of the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the National Penitentiary Authority, the Association of Magistrates, the General Prosecutor’s Office, the Anti-Organised Crime Prosecutor’s Office (DIICOT). Moreover, street protests started on 18 January, culminating, on 22 and 29 January, with a massive demonstration in Bucharest and in the main cities (Cluj, Timisoara, Sibiu, Iasi). Several NGOs<sup>3)</sup> ExpertForum, Institute for Public Policies (IPP), Freedom House – Romania, Group for Social Dialogue (GDS) a.s.o. also expressed their views against the measures, as well as representatives of the opposition political parties (PNL and USR). The day after the massive protests, the President of Romania, Klaus Iohannis, announced his intention to convene a referendum on the matter.

On 24 January, the President addressed a letter to the Parliament, announcing the intention to call a referendum on “anti-corruption fight” as a national interest problem, according to Article 90 of the Constitution. The Parliament, whose opinion is only consultative for the President, can give an answer in 20 days, after which the referendum must be organised by the Government.

The first and major critique of the Government plan of action is that the adoption of such measures by Emergency Ordinance, without any parliamentary debate, is contrary to the Constitution, because no real emergency can be detected in order to comply with the constitutional requirement of Article 115 para. 4.<sup>4)</sup> “The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.” Therefore, the Government should not legislate on fields that normally must be regulated by organic laws (i.e. laws that need an absolute majority in order to be adopted by the Chambers of Parliament). Since the adoption of the 1991 Constitution, the only two collective pardons were adopted by laws of Parliament in 1997 and 2002. Another important constitutionality reason, invoked by the Superior Council of Magistracy in its negative opinion, is that a law adopted by the Parliament can be challenged at the Constitutional Court before its promulgation, whereas an emergency ordinance enters into force immediately after adoption, which means that, even if it would be declared unconstitutional later on, its effects were irreversible.<sup>5)</sup> SCM, *Opinion on the draft Emergency ordinance regarding the pardon of some punishments*, 25 January 2017, available at [www.csm1909.ro](http://www.csm1909.ro). A major drawback of the Constitution is, thus, the lack of an effective prior control over emergency ordinances, in order to prevent the entering into force of unconstitutional ones.

Secondly, the contents of the ordinances was highly criticized for attempting to lift the criminal conviction or criminal responsibility from targeted persons or categories (politicians or public officers accused of corruption). Thus, for instance, the offence of “abuse of office”, for which Mr. Dragnea is under criminal pursuit since 2016, was changed in the sense that it would become a criminal offence only if the damage produced were of at least 200,000 lei (approx. 45,000 euros), otherwise it remains unpunishable. As in Romania the more lenient criminal law has retroactive effects, according to Article 15 (2) of the Constitution, all public officers and politicians accused or convicted for abuse of office will escape legal responsibility.

As for the ‘pardon ordinance’, although it excludes crimes committed with violence and some corruption offences, it does not exclude either ‘assimilated corruption offences’, including abuse of office or crimes against humanity.<sup>6)</sup> Of which is accused the “honorary president” of the PSD and former President of Romania, Ion

Iliescu, for the violences committed during the miners' riots in Bucharest in June 1991.

In disregard of the negative arguments of all relevant institutions: the concerns of the European Commission, the President's call for referendum on the issue and the above-mentioned national judicial authorities' strong opposition, despite the serious public protests (over 90,000 demonstrated on 29 January), despite the fact that some of the governmental officials had declared that the issues will be sent to Parliament for debate, the Government went along with the draft, in a slightly modified form.

Thus, on a second "Black Tuesday"<sup>7)</sup> The first "Black Tuesday" took place in December 2013, when the Chamber of Deputies tried to change the Criminal Code so as to change the meaning of the offence of 'conflict of interest'. The amendments were declared unconstitutional by the Constitutional Court. See, for details, Bianca Selejan-Gutan, *The Constitution of Romania...*, op.cit., p. 86., 31 January 2017, during a tempestuous meeting convened at night (after 8 p.m.), the Government adopted one of the ordinances without it being on the official agenda (which only included the draft of the annual budget law) and sent the other one as a draft law to the Parliament. The ordinance that was adopted is the one regarding the "hidden amnesty", i.e. the partial decriminalisation of abuse of office (i.e. of any such facts that provoked a damage less than 100,000 lei) and the reduction of the punishment to less than half. The ordinance also decriminalises the "favouring of the offender" if committed by a family member or, [emphasis added] "*in the case of issuing, approving or adopting normative acts.*"<sup>8)</sup> Article I.3. of the Emergency Government Ordinance no. 13/2017 (published in Official Journal no. 92 of 1 February 2017).

The ordinance, which also contains some changes of the Code of Criminal Procedure (e.g. denunciation of bribery must be made within 6 months since the offence was committed, otherwise it has no effects) was rushed to the Official Journal and published during the same night, around 1 a.m.. The ordinance states that the dispositions regarding the changes of the Criminal Code will enter into force in ten days from publication. It is still unclear (but proves the lack of an actual emergency) why the 10-days period was enacted, as usually emergency ordinances enter into force immediately, precisely due to their "exceptional" character.

The hidden way in which the Government chose to adopt the ordinance and the draft law, during the night and without announcing its intentions, generated a massive public discontent: massive popular protests in Bucharest and major cities, strong reactions from institutions (President of Romania, Superior Council of Magistracy, Prosecutor General) and from the civil society. In a country [plagued by 'endemic corruption'](#) as Romania, such attempts to discourage anti-corruption measures, including by changing major criminal laws, is, sadly, a major step back after 10 years of EU membership or "[the ex-communist state's biggest retreat on anti-corruption reforms since it joined the European Union a decade ago.](#)"

## References [ + ]

1. ↑ See also Bianca Selejan-Gutan, *The Constitution of Romania. A Contextual Analysis*, Oxford, Hart Publishing, 2016, pp. 131-133.
2. ↑ Ibidem, pp.193-197.
3. ↑ ExpertForum, Institute for Public Policies (IPP), Freedom House – Romania, Group for Social Dialogue (GDS) a.s.o.
4. ↑ "The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents."
5. ↑ SCM, *Opinion on the draft Emergency ordinance regarding the pardon of some punishments*, 25 January 2017, available at [www.csm1909.ro](http://www.csm1909.ro).

- 
6. ↑ Of which is accused the “honorary president” of the PSD and former President of Romania, Ion Iliescu, for the violences committed during the miners’ riots in Bucharest in June 1991.
- 
7. ↑ The first “Black Tuesday” took place in December 2013, when the Chamber of Deputies tried to change the Criminal Code so as to change the meaning of the offence of ‘conflict of interest’. The amendments were declared unconstitutional by the Constitutional Court. See, for details, Bianca Selejan-Gutan, *The Constitution of Romania...*, op.cit., p. 86.
- 
8. ↑ Article I.3. of the Emergency Government Ordinance no. 13/2017 (published in Official Journal no. 92 of 1 February 2017).
- 

---

**LICENSED UNDER CC BY NC ND**

SUGGESTED CITATION Selejan Gutan, Bianca: ‘*We Don’t Need No Constitution*’ – *On a Sad EU Membership Anniversary in Romania*, *VerfBlog*, 2017/2/01, <http://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/>.